IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

Estate of DOROTHY MARTIN; MARY MARTIN,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF VETERANS AFFAIRS, et al.,

Defendants.

CIV-S-02-2334 DFL-GGH

MEMORANDUM OF OPINION AND ORDER

Plaintiff Mary Martin, individually and on behalf of the estate of her mother Dorothy Martin (collectively "Martin"), brought this suit against the California Department of Veterans Affairs and various of its officers (collectively "the Department") alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, and the Rehabilitation Act, 29 U.S.C. § 794. Plaintiffs claim that the Department improperly denied Dorothy Martin admission to the Veterans Home of California ("VHC") because she suffered from

Alzheimer's disease. Martin also asserted a claim under the equal protection clause and state law claims for negligent and intentional infliction of emotional distress.[1]

The case was tried to a jury beginning on October 11, 2005. On October 18, 2005, both parties filed motions for judgment as a matter of law. The court granted the Department's motion in part, dismissing: (1) the equal protection and state law tort claims; (2) Mary Martin's claims under the ADA and the Rehabilitation Act because she lacked standing; and (3) the compensatory damages claims for violations of the ADA and the Rehabilitation Act because Martin did not provide evidence of intentional discrimination. On October 20, 2005, the jury returned a verdict for the Department finding that Martin did not prove by a preponderance of the evidence that the Department discriminated based on disability. On October 28, 2005, the Department submitted a bill of costs. On November 4, 2005, Martin filed a renewed motion for judgment as a matter of law and a motion for new trial. Martin's motions and the Department's

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[1] The court's July 22, 2003 order explains that neither the Department nor its officers are shielded from suit in federal court under the Eleventh Amendment as to the ADA and Rehabilitation Act claims. See Lovell v. Chandler, 303 F.3d 1039, 1050 (9th Cir. 2002). However, the court found that plaintiffs could not bring ADA or Rehabilitation Act claims against the Department officers in their individual capacities because both statutes are directed at the actions of public entities only. See Miranda B. v. Kitzhaber, 328 F.3d 1181, 1188(9th Cir. 2003). Finally, the supplemental state law tort claims were dismissed as to the Department and the defendants in their official capacities because of the Eleventh Amendment bar. These claims were permitted to go forward against the individual defendants in their individual capacities.

bill of costs are the subject of this order.

I. Judgment as a Matter of Law

Martin raises ten arguments in support of her renewed motion for judgment as a matter of law. Each argument is addressed under a separate heading below.

A. Facial Discrimination

Martin asserts that when compared to similarly-situated non-disabled applicants to the VHCs, applicants with Alzheimer's or dementia[2] are denied admission because of their disability.[3]

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[2] There has been some inconsistency in Martin's theory of discrimination. In its ruling on the summary judgment motions, the court permitted the case to go forward on the view that Martin was alleging discrimination against persons with a particular disease, Alzheimer's, regardless of its severity, as compared to other eligible veterans with different disabilities. It appears that Martin may have abandoned this theory given that the evidence shows that during the time of her application the VHCs did not expel veterans already resident in the home who developed Alzheimer's. There was some evidence that the Chula Vista home may have had a policy of excluding applicants with Alzheimer's disease, even if the applicant was otherwise able to function in the residential domiciliary facility ("DOM"). However, although the parties disputed the degree of Dorothy Martin's disability, the weight of the evidence favored a jury finding that at no relevant time was she qualified for the DOM.

[3] In the reply brief, Martin argues that "all that is required under the ADA is that the disability be a 'motivating factor' in the decision to exclude the plaintiff, rather than the 'sole' factor. (Id. (citing Head v. Glacier Northwest Inc., 413 F.3d 1053, 1065 (9th Cir. 2005)).)

This argument is irrelevant for two reasons. First, "[a] post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion." Fed. R. Civ. P. 50(b), Advisory Committee Notes on the 1991 Amendments; see also Murphy v. City of Long Beach, 914 F.2d 183, 186 (9th Cir. 1990). Because Martin failed fairly to raise this argument previously, the court cannot address it now. Second, even if the "motivating factor" standard applied, the jury still could have reasonably concluded that Dorothy Martin's disability did not "motivate" the

Martin asserts that "[d]efendants' policies are unnecessary, facially discriminatory, and therefore invalid and illegal under the [ADA], the Rehabilitation Act, and the equal protection clause of the 14th Amendment." (Mot. at 3-4.)[4] The focus of this attack is on the four different care levels and facilities and, more particularly, the VHC policy of reserving 25% of the vacant beds in the higher care levels for existing residents of the DOM. The stated reason for the policy is to assure residents of the DOM that they will not face expulsion if they become infirm and require a space in one of the higher care levels. The unfortunate result of this otherwise understandable policy is that an eligible veteran like Dorothy Martin, not already a member of a Home, may be denied admission to the higher care levels even though a bed is open.

Several layers of rules and regulations govern the VHC's admission policies. First, California Military & Veterans Code § 1012 enumerates the eligibility requirements for admittance to one of the VHC homes. According to § 1012, eligible individuals are those who: (1) served in the U.S. armed forces; (2) were

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Department's decision to exclude her, as discussed below.

[4] Martin also asserts that the policies violate state law because they "impermissibly alter and restrict the scope of the [VHC] eligibility statute (Cal. Mil. & Vets. Code § 1012)." According to Martin, § 1012 requires the VHC to admit any qualified veteran whether or not there is space in the VHC for that veteran. There are a number of problems with this line of argument: (1) § 1012 does not say this, (2) it is not reasonable to interpret the statute in the manner suggested given that the statute itself envisions that not enough space will be available for all eligible veterans, see Cal. Mil. & Vets. Code § 1012(b)(1), and (3) plaintiffs did not make a claim under § 1012.

honorably discharged from service; (3) are eligible for hospitalization or domiciliary care in a veterans' facility in accordance with the rules and regulations of the U.S. Department of Veterans Affairs; and (4) are bona fide residents of California at the time of application. Cal. Mil. & Vet. Code § 1012(a). Dorothy Martin is eligible for admission to a VHC home under these criteria.

Second, each VHC home has its own admission policies and rules. The rules of all three VHC homes to which Dorothy applied refer to Alzheimer's as a possibly disqualifying condition for admittance depending on the severity of the condition.[5] For instance, Barstow's admissions policies state that an applicant whose medical needs "exceed the reasonable resources of the Home shall be rejected or referred to the Chief Medical Officer for further review such as . . . (3) diagnosis of Alzheimer's related Dementia." (Pls.' Ex. 50.) Similarly, Yountville's policies state that "[a]n applicant whose medical needs exceed the reasonable resources of the Home shall be denied, such as . . . (4) diagnosis of Alzheimer's or dementia whose needs exceed current resources." (Id. Ex. 52.) Finally, Chula Vista's current policies explicitly exclude Alzheimer's patients, listing Alzheimer's disease as a disqualifying condition for admission. (Id. Ex. 51.) However, this policy was not created until December 2001, one month after Dorothy Martin's death. (Id.)

[5] California Military and Veterans Code § 1044 gives the VHCs the authority to adopt their own policies.

In addition to the admissions restrictions, the VHC homes are limited by statute and regulation as to what levels of care they can provide. All three VHC homes, collectively, offer admissions to four levels of care: Domiciliary ("DOM"), Residential Care for the Elderly ("RCFE"), Intermediate Care ("ICF"), and Skilled Nursing ("SNF"). (Defs.' Trial Br. at 1-2.)

The DOM provides the lowest level of care and does not provide nursing services. (Defs.' Ex. 20 at 1.) Residents must be entirely independent and able to perform all of the activities of daily living ("ADLs"). (Id.) The DOM is a group home that provides a social community and activities for independent elderly veterans in a dormitory setting. The RCFE is the next level of care and provides medication assistance and stand-by assistance for bathing. (Id. at 2.) The ICF provides more assistance than the RCFE, but only admits residents who need assistance with no more than two ADLs. (Id.) Finally, the SNF provides 24-hour in-patient care, including medical, nursing, dietary, and pharmaceutical services. (Id.) Not all four levels of care are offered at all three VHC homes at all times. (Id. at 2-3.) To be eligible for state and federal funding, each VHC home must obtain a separate license issued by the California Department of Health Services for each level of care at that VHC home. (Id. at 4, 7, 8.) CDVA regulations define what services can be provided in each level of care. Cal. Code Regs. tit. 12, § 503. Additionally, during the relevant time period, CDVA regulations required that "[n]o direct admission to the [SNF

level of care] is allowed from outside sources except when the [SNF] occupancy rate is below 75%." Id. § 501.2.

These policies are not facially discriminatory as a matter of law. First, the ADA does not force a health care provider "to provide extraordinary services which it is not set up to deliver." Alexander v. Pathfinder, Inc., 906 F. Supp. 502, 507 (E.D. Ark. 1995), judgment aff'd in part, rev'd in part, 91 F.3d 59 (8th Cir. 1996) (finding that discharging a disabled individual from a residential intermediate care facility is not discriminatory if the individual required considerably more medical care than the facility could provide). As the Alexander court noted,

> [t]he ADA was never intended to prevent a facility, whose 'customers' are all disabled, from limiting the scope of the services it provides to the disabled. Surely all facilities cannot be required to serve disabled individuals with every degree of disability. If that were the case, it would require abandonment of designations such as "intermediate care" and "total care." As noted, federal regulations are replete with such distinctions; it cannot have been the intent of Congress to prohibit the specialization of facilities which care for the disabled.

Id. at 508. Therefore, the CDVA's policy to limit the services it provides and to create specialized units of care based on severity of disability is not facially discriminatory under the ADA. Otherwise, most, if not all healthcare facilities would be facially discriminatory -- a physical rehabilitation center for not offering chemotherapy, a retina institute for not offering hearing aids, a residential nursing facility for not offering an intensive care unit. Furthermore, the jury could also find from

the record that the policy of all the various homes was not to exclude an eligible veteran with a diagnosis of Alzheimer's but only to exclude a veteran with such a diagnosis if her condition was such that the Home could not properly treat it or if the condition required placement in a care level that was unavailable.

The Department's 75% rule is also not discriminatory as a matter of law. As plaintiffs acknowledge, the VHCs serve to provide long-term care for aged and disabled veterans. (Mot. at 6.) Thus, the VHCs have a long-term obligation to their members and may ensure that those members have access to sufficient care throughout their lives. It was up to the jury to decide whether the 75% rule was a reasonable way to protect existing residents from eviction or was instead a cover for discrimination. Defendants introduced evidence that if the VHCs were forced to accept every new Alzheimer's applicant the Homes would run out of room for existing residents that later develop the disease.[6] Therefore, a jury could conclude that the Department's decision to save room for existing residents rather than to admit new

[6] If one were to follow plaintiffs' argument to its logical conclusion, these discharged residents could also claim that they were excluded "on the basis of disability" in violation of the ADA. To prevent such claims, the Department would be forced to provide care to all Alzheimer's patients who either resided in the homes or applied for admission to the homes, or shut the homes entirely. Given the extraordinary growth of Alzheimer's in the veteran and general population, it is likely that the VHCs would be forced to close. The ADA does not require such a counter-productive result.

residents was not discriminatory under the ADA.[7]

For these reasons, the court denies plaintiffs' motion for judgment as a matter of law on the grounds that the Department's regulations are facially discriminatory under the ADA or the Rehabilitation Act.

B. "Qualified Individual with a Disability"

Plaintiffs assert that "[t]he evidence presented at trial conclusively established that Dorothy Martin was a 'qualified individual with a disability' under the ADA and the Rehabilitation Act." (Mot. at 8.)

A. Qualified Individual

A person is "qualified" if she satisfies all of a program's requirements other than those that are unreasonable and discriminatory. Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1205 (9th Cir. 1984). As discussed above, a reasonable jury could determine that the Department's requirements were not unreasonable or discriminatory. Therefore, the jury had the responsibility to evaluate whether Dorothy Martin was "qualified" at the time she applied based on these requirements. Dorothy Martin also would have qualified for a certain level if the Department could have made reasonable accommodations to enable her to qualify for that level at the time she applied. 28 C.F.R. § 35.130(b)(7).

At trial, defendant introduced Dorothy Martin's medical

[7] The analysis under the Rehabilitation Act is the same.

records and her VHC application to demonstrate that she required assistance with at least 5 ADLs, including bathing, grooming, dressing, medication, and toileting. (Def.'s Exs. 1-13, 17.) From this evidence, the jury could conclude that Dorothy Martin was only qualified for the SNF facility.

Defendants also presented evidence to show that, at the time she applied for admission, none of the facilities had SNF beds available. The Chula Vista facility was under construction and the SNF was not yet completed. (Def.'s Ex. 36.) Barstow had lost its certification for its SNF and could not legally receive government funds for new admissions. (Def.'s Trial Br. at 2.) Finally, defendants presented evidence that Yountville was not accepting outside applicants because the occupancy rate of the SNF was 81.5% when Dorothy Martin applied in November 2000 and there were already 45 people on the waiting list for the SNF. (Pls.' Ex. 37.) By October 24, 2001, when Mary Martin renewed her inquiry, the situation had worsened; by then the occupancy rate was at 75.6% and there were 99 people on the waiting list. (Def.'s Ex. 37.)

Plaintiffs produced calculations at trial to show that the actual occupancy rate of the SNF never came close to 75% from 1994 through 2003, given the number of residents at each level of care and the licensed capacity of the SNF. (Reply at 8.) However, defense witness Marcella McCormack testified that plaintiffs' calculations were incorrect because the licensed beds were unfunded and could not be used. (Surreply at 5.) Moreover,

even if the beds could have been used, Yountville would likely have admitted the dozens of people already on the waiting list before it would have admitted Dorothy Martin.

Given this evidence, a reasonable jury could conclude that none of the VHCs had room for Dorothy Martin at the time she applied, and that she was otherwise unqualified for admission.

B. Reasonable Accommodations

Dorothy Martin is also a "qualified individual" if the Department could have made reasonable modifications to enable her to qualify. 28 C.F.R. § 35.130(b)(7). The initial burden is on plaintiffs to establish the existence of reasonable modifications. Zukle v. Regents of Univ. of Cal., 166 F.3d 1041, 1047 (9th Cir. 1999). This burden is "not a heavy one." Henrietta D. v. Bloomberg, 331 F.3d 261, 280 (2d Cir. 2003). "[I]t is enough for . . . plaintiff[s] to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." Id. Once the plaintiff has done this, "[t]he burden shifts to the [Department] to produce evidence that the . . . accommodation would require a fundamental or substantial modification of its programs or standards." Zukle, 166 F.3d at 1047.[8]

[8] Although Zukle and Henrietta deal with reasonable accommodations under Title III rather than Title II, the burden is the same under both titles. See McGary v. City of Portland, 386 F.3d 1259, 1266 (9th Cir. 2004) ("Although Title II of the ADA uses the term 'reasonable modification,' rather than 'reasonable accommodation,' these terms create identical standards.")

In analyzing whether an accommodation would be a "fundamental alteration," the financial and other logistical limitations on a state's capacity to provide such services must be considered, Townsend v. Quasim, 328 F.3d 511, 519-20 (9th Cir. 2003), as well as whether the modification would alter the essential nature of the program or impose an undue burden or hardship in light of the overall program. Easley v. Snider, 36 F.3d 297, 305 (3d Cir. 1994). The analysis looks not simply at the cost of accommodating the specific plaintiff but rather to whether "immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." Olmstead v. L.C., 527 U.S. 581, 604, 119 S.Ct. 2176 (1999). The jury was so instructed.

Plaintiffs suggested at trial that the Department could have: (1) used all licensed beds or created more; (2) provided dementia care in the lower levels; (3) admitted to the SNF without certification; (4) ignored or eliminated the 75% rule; (5) admitted to a "crowded" SNF on a conditional basis; (6) paid for the care of all eligible veterans at private facilities; or (7) built fences, installed alarms or re-hung gates to make the RCFE suitable for Alzheimer's and dementia patients. (See Mot. at 12.)

The Department introduced evidence that these suggested accommodations would create an undue hardship because the costs of implementing them would financially cripple the Department and

prevent it from maximizing the number of veterans it could assist. A reasonable jury could conclude from the testimony that: (1) the VHCs could not reasonably use all licensed beds or create more beds because they could not afford the nurses to care for the people who would occupy them; (2) the VHCs could not have provided dementia care in the lower levels because doing so would effectively turn those units into SNF units, which require separate licenses and increased staffing; (3) the VHCs could not admit to the SNF without certification, because to do so would violate the law; (4) ignoring or eliminating the 75% rule would leave current members without beds once their needs increased, as would admitting to a "crowded" SNF on a conditional basis; (5) the cost of paying for every disabled veteran's private care would be prohibitive; and (6) building restrictive structures like fences would psychologically harm veterans who experienced the shock of battle and may have been prisoners of war. In sum, from this evidence the jury could conclude that the Department was not able to make any reasonable accommodations to admit Dorothy Martin. Judgment as a matter of law for plaintiffs is not possible.

C. Exclusion Because of Disability

Plaintiffs next argue that they are entitled to judgment as a matter of law because "[t]he evidence presented at trial conclusively established that Dorothy Martin was excluded from receiving the benefits of the VHC because of her disability." (Mot. at 9.) However, as discussed in subsection A above, a

reasonable jury could conclude that she was not excluded because of her disability but because of policies that were not discriminatory.

D. "Fundamental Alteration" Defense

Plaintiffs assert that the "fundamental alteration" defense does not apply in cases of facial discrimination. (Mot. at 6 (citing Bay Area Addiction Research & Treatment, Inc. v. City of Antioch ("BAART"), 179 F.3d 725, 734-35 (9th Cir. 1999); Lovell v. Chandler, 303 F.3d 1039, 1054 (9th Cir. 2002).) Even if this were a case of facial discrimination, plaintiffs cannot raise this argument now because they did not raise it in their pre-verdict motion for judgment as a matter of law. Fed. R. Civ. P. 50(b), Advisory Committee Notes on the 1991 Amendments; see also Murphy v. City of Long Beach, 914 F.2d 183, 186 (9th Cir. 1990). In their original motion, plaintiffs merely stated that "[t]he evidence presented at trial also conclusively proved that Defendants' anticipated defenses of undue burden or fundamental alteration are not applicable." (Pre-verdict Mot. at 5.) Plaintiffs did not argue that they were inapplicable because the Department's policies were facially discriminatory. Moreover, plaintiffs included the defense in their proposed jury instructions ## 30 and 31. Although the court does not have a transcript of the jury instruction proceedings, it has no recollection of any objection by plaintiffs to the court's inclusion of the defense in the final jury instructions. The Ninth Circuit has assumed that the defense applies when

plaintiffs fail to challenge its use. Townsend, 328 F.3d at 518.

Plaintiffs also argue that the defense does not apply here because "the necessary factual findings were not made, in writing, by the head of a public agency or their designee." (Mot. at 10 (citing 28 C.F.R. §§ 35.149, 35.150).) This argument is equally unavailing. Section 35.150(a)(3) may create a procedural requirement that the head of a department make written findings that a change would result in a fundamental alteration. However, there is no indication that a department head's failure to do so harms particular disabled individuals, in a way that Title II aims to prevent or redress. See Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 913-15 (6th Cir. 2004) (holding no private action exists to enforce § 35.150(d)).

E. Dorothy Martin's Emotional Distress Damages

Plaintiffs assert that "Dorothy Martin may recover for her own emotional distress suffered during her lifetime, because the California law extinguishing emotional distress damages is inherently hostile to the remedial and deterrent policies underlying § 1983." (Mot. at 12.) However, the court entered judgment for defendants on the § 1983, equal protection claim. As discussed below, the court declines now to reverse course and enter judgment for plaintiff Dorothy Martin on this claim. This issue therefore is moot. Moreover, were it not, and as the parties are well aware, the court has previously addressed this precise issue in another case and found that the remedies provided by California law are not contrary to the purposes of

§ 1983. Venerable v. City of Sacramento, 185 F.Supp.2d 1128, 1133 (E.D. Cal. 2002).

F. Mary Martin's Financial and Emotional Distress Damages

Plaintiffs argue that "Mary Martin may also recover for her own financial damages and emotional distress under the ADA and the Rehabilitation Act." (Mot. at 13.) Mary Martin asserts that she has "been directly and personally aggrieved and damaged by Defendants' conduct." (Pls' Compl. ¶ 33.) According to Mary Martin, she was financially and emotionally burdened with the care of her ailing mother because the VHCs would not admit her.

In certain limited circumstances, non-disabled individuals may claim "associational" discrimination, giving them standing to sue under the ADA and the Rehabilitation Act. Innovative Health Sys. v. City of White Plains, 117 F.3d 37, 46-47 (2d Cir. 1997) (overruled on other grounds). However, a non-disabled plaintiff must still show that she "suffered a specific, separate, and direct injury to [herself] caused by defendant's actions." Glass v. Hillsboro Sch. Dist., 142 F.Supp.2d 1286, 1288 (D. Or. 2001). Although there are few opinions on this issue, it appears that courts do not permit a caretaker or relative to bring a claim on his or her own behalf because of discomfort, distress, or loss due to the denial of benefits to some dependent loved one. See, e.g, Simenson v. Hoffman, 1995 WL 631084 (N.D. Ill. 1995)(no separate claim where doctor "yelled that he would not treat 'that sick child'" in presence of parents); Niemeier v. Tri-State, 2000 WL 1222207 (N.D. Ill. 2000) (husband may not claim damages

because of denial of fertility treatment to wife). Though Mary Martin allegedly suffered financial loss and emotional distress, she did not have a separate right to CDVA's services. Her attempt to gain access to the VHC related solely to her mother's care. Therefore, the court finds that she does not have independent standing to sue under the ADA and the Rehabilitation Act.

G. Equal Protection

Plaintiffs claim that they are "entitled to judgment as a matter of law on their § 1983 claims because the policies are irrational and facially discriminatory, and were applied (or at least sanctioned) knowingly and intentionally by the individual Defendants, with (at least) reckless disregard. Facially discriminatory admissions *per se* have no rational basis, and thus cannot pass muster in the Court's equal protection analysis." (Mot. at 13-14.) The court granted judgment to defendants on the equal protection claim before the case was submitted to the jury.

As already discussed above, a reasonable jury could conclude that the Department's policies were not facially discriminatory. Even if they were, disability does not constitute a suspect classification under the Equal Protection Clause. Does 1-5 v. Chandler, 83 F.3d 1150, 1155 (9th Cir. 1996). Review is under the rational basis standard, a highly deferential standard that puts the burden on the plaintiff to negate every conceivable basis that might support the action. Rui One Corp. v. Berkley, 371 F.3d 1137, 1155 (9th Cir. 2004). As discussed above, the

Department has presented evidence that it denied admission to Dorothy Martin because it did not have the resources to care for her. A reasonable jury could conclude that plaintiffs did not present sufficient evidence to negate this assertion. Therefore, the court denies plaintiffs' motion for judgment on this issue.

H. Mary Martin's Standing under § 1983

Plaintiffs claim that "Mary Martin also has standing to bring her own claims for damages under 42 U.S.C. § 1983. (Mot. at 15.) However, this issue is moot given the discussion above.

I. Intentional Infliction of Emotional Distress ("IIED")

Plaintiffs claim "that they are entitled to recover under a theory of [IIED], because Defendants' facially discriminatory policies were, by definition, intentional discrimination." (Mot. at 16.) The court granted judgment to defendants on the IIED claim before the case was submitted to the jury.

The elements of an IIED claim in California are: (1) "[e]xtreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the potential for causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." KOVR-TV, Inc. v. Superior Court, 31 Cal.App.4th 1023, 1028 (1995). "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." Id. (citation omitted). Plaintiffs assert that intentional discrimination is *per se* outrageous conduct. (Mot.

at 16.)

As discussed above, the Department introduced sufficient evidence at trial that it did not discriminate, intentionally or otherwise, against Dorothy Martin based on her disability. A jury could reasonably find that the Department's decision to deny admission to Dorothy Martin was not outrageous or extreme. Indeed, a jury could find that the Department's decision was reasonable under the circumstances. Therefore, the court denies plaintiffs' motion for judgment on this claim.

J. Negligent Infliction of Emotional Distress ("NIED")

Plaintiffs claim that they "are also entitled to judgment as a matter of law under a theory of negligent infliction of emotional distress." (Mot. at 16.) The court also granted judgment to defendants on this claim before the case was submitted to the jury.

"The traditional elements of duty, breach of duty, causation, and damages apply" to an NIED cause of action. Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc., 48 Cal.3d 583, 588 (1989). "Whether a defendant owes a duty of care . . . depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against imposition of liability." Id. In general, friends and family members may not bring an NIED claim because of the emotional suffering they incur as a result of injury to another. Such a claim "has been permitted in two types of situations, referred to as 'bystander' and 'direct victim' cases." Ess v. Eskaton Props., Inc., 97

Cal.App.4th 120, 126-27 (2002) (citing Burgess v. Superior Court, 2 Cal.4th 1064, 1072 (1992)).

Recovery in a bystander case requires Mary Martin to prove that she: (1) is closely related to the victim; (2) was present at the scene of the injury-producing event at the time it occurred and knew that the victim was being injured; and (3) suffered emotional distress beyond what a disinterested witness would likely suffer. Thing v. la Chusa, 48 Cal.3d 644, 647 (1989).

In typical bystander cases, the plaintiff has suffered a contemporaneous awareness of a sudden accident or injury-causing event. See e.g., Hedlund v. Superior Court, 34 Cal.3d 695, 706 (1983) (son recovers when seated next to mother who was shot).

Mary Martin has not alleged that she suffered a similar type of contemporaneous awareness of an injury-causing event. She has not produced evidence that her mother's health deteriorated suddenly because she was not admitted to one of the VHCs. Rather, Mary Martin claims that she suffered emotional distress because she "was left with the responsibility of locating, obtaining, overseeing and paying for alternative care for Dorothy." (Pls.' Trial Br. at 20.) This is not the type of emotional distress claim permitted under a bystander theory of recovery. Therefore, the Department did not owe Mary Martin a duty under the bystander theory of liability.

To recover as a direct victim, the plaintiff must be a patient of the defendant caregiver. Ess v. Eskaton Props., Inc.,

97 Cal.App.4th 120, 128 (2002). A familial relationship with the injured party alone is not sufficient to support a claim. Id. (sister of injured nursing home patient has no cause of action even though sister was responsible for the placement). The Department owed a duty to Dorothy Martin, not to her daughter.

Even if the Department owed Mary Martin a duty, the jury could have concluded based on the evidence presented that the Department did not breach that duty. As discussed previously, defense witnesses testified repeatedly that the VHCs only denied Dorothy Martin admission because they did not have the resources to care for her. A reasonable jury could conclude from that testimony that the Department's actions were unavoidable and not negligent. Therefore, plaintiffs' motion for judgment on this claim is denied.

II. Motion for New Trial

Plaintiffs raise twenty-two arguments in support of their motion for new trial. Each argument is discussed under a separate heading below.

A. Instruction #14: "Lowest Level of Care"

Plaintiffs claim that:

> [t]he Court committed a prejudicial error of law in instructing the jury in its instruction #14 that "You should determine the lowest level of care, if any, for which Dorothy Martin was a 'qualified individual.' She would have qualified for a certain level of care if she met the essential eligibility requirements for that level of care at the time she applied."

(Mot. at 19.)

This instruction was not erroneous. In an ADA and Rehabilitation Act claim, the jury must determine whether the individual "satisfies all of a program's requirements other than those that are unreasonable and discriminatory." Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1205 (9th Cir. 1984). The levels of care were included among the VHCs' requirements. (Pls.' Exs. 50-52.) The VHCs had the authority to create these requirements under Cal. Mil. & Vet. Code § 1044. Furthermore, as discussed previously, a reasonable jury could have determined that these requirements were not unreasonable or discriminatory. Therefore, consideration of the levels of care was necessary in determining whether Dorothy Martin was a "qualified individual." See Grubbs v. Med. Facilities of Am., Inc., 879 F.Supp. 588, 591 (W.D.Va. 1995) (holding that, when plaintiff could not meet the requirements for the level of care she required, she was not "otherwise qualified"). Moreover, instructing the jury to consider the lowest level of care for which Dorothy Martin was eligible was an instruction that favored plaintiff's contention that she was qualified for the RCFE with modest accommodations. Presumably this is why plaintiffs did not object to the instruction at trial and should not be heard to do so now.[9]

B. Instruction #14: "Reasonable Accommodation or Modification"

Plaintiffs assert that:

[9] Because the court does not have a transcript, it must rely on its recollection of whether objection was made at the jury instruction conference.

> [t]he Court committed a prejudicial error of law in instructing the jury in instruction #14 that "A reasonable accommodation or modification may include . . . minor alterations to physical facilities." This instruction misstated the applicable law, because reasonable accommodations are not limited to minor alterations to physical facilities.

(Mot. at 19-20.)

Plaintiffs mischaracterize the instruction. The instruction included several other possible "reasonable accommodations," such as "job restructuring, modifying an application process, acquisition or modification of equipment or devices, [and] adjustments to training" (all excluded by plaintiffs' elipses). Moreover, the instruction did not limit it to these possibilities by using the words "*may* include," not "only include." And, again, the court recalls no objection to this instruction at trial on this ground.

C. Instruction #15: Considering the "Level of Care"

Plaintiffs claim that "[t]he Court committed a prejudicial error of law in instructing the jury in its instruction #15 that it should consider 'the Department's decision to deny admittance to a level of care, for which Dorothy Martin was qualified . . .'" (Mot. at 20.) As discussed above, the instructions regarding the levels of care were proper and necessary for this claim.

D. Instruction #15: Disability as a "Motivating" Factor

Plaintiffs claim that "[t]he Court committed a prejudicial error of law in instructing the jury in its instruction # 15 that

" . . . if you find that the Department's standards promote another purpose, the standards may not be discriminatory." (Mot. at 20.) Plaintiffs assert that "all that is required under the ADA is that the disability be a 'motivating factor' rather than the 'sole' factor." (JMOL Reply at 3.) However, plaintiffs never stated this as a ground of objection to the instructions until its reply brief in support of its renewed motion for JMOL and new trial. Moreover, in their Proposed Jury Instruction #18, plaintiffs state that the plaintiff's disability must be "*the* determining factor," rather than "*a*" determining factor. Thus, plaintiffs cannot assert this argument now. See Fed. R. Civ. P. 51(c); Ayuyu v. Tagabuel, 284 F.3d 1023, 1026 (9th Cir. 2002). Further, plaintiffs' Proposed Jury Instruction #36 states that "plaintiffs claim that Dorothy Martin's disability was the sole reason for the defendant's decision not to provide benefits and services to Dorothy Martin." This seemed to be plaintiffs' theory of the case from the beginning of the litigation. Plaintiffs never provided a mixed motive instruction and it would be unfair to now introduce this new theory that may or may not apply. Finally, the language under scrutiny does not actually address the issue because it can be understood consistently with plaintiffs' position. This is probably why, to the court's best recollection, no specific objection was made to this language at trial.

E. Instruction #15: "Some Other Non-Discriminatory Reason"

Under the same rationale discussed in Section D, plaintiffs

assert that "[t]he Court committed a prejudicial error of law in instructing the jury in its instruction #15: " . . . if you find that Dorothy Martin was treated differently for some other non-discriminatory reason, the defendant did not engage in discrimination because of her disability and you should find in favor of defendant." (Mot. at 20.) For the reasons discussed above, plaintiffs cannot assert this argument now.

F. Instruction #17: Defense of Undue Hardship

Plaintiffs claim that "[t]he Court committed a prejudicial error of law in instructing the jury in its instruction #17 about the defense of undue hardship, which was not available to Defendant as a matter of law. (Nor is undue hardship an absolute defense, as portrayed in the Court's instruction.)" (Mot. at 20.)

Plaintiffs' argument is flawed among other reasons because the jury never had to consider the defense. As demonstrated on the jury verdict form, the jury concluded that the Department did not discriminate against Dorothy Martin by reason of her disability. (Verdict Form, Docket # 155.) The verdict form specifically stated that if the jury made this finding, it should not go on to answer question #2 which asked the jury if the Department had proven any of its defenses. (Id.) Therefore, even if it were erroneous to instruct on undue hardship, such an error was harmless and not grounds for a new trial.

G. Instruction #21: Compensatory Damages

Plaintiffs assert that:

> [t]he Court committed a prejudicial error of law in instructing the jury in its instruction #21 that "An award of compensatory damages should be limited to the net cost of the Estate of Dorothy Martin of any services she was required to obtain as a consequence of her denial of admission to a Veterans Home."

(Mot. at 21.) However, the jury never considered damages because it concluded that the Department did not violate the ADA or the Rehabilitation Act. Therefore, any error would be harmless.

H. Instruction #21: Emotional Distress Damages

Plaintiffs assert that "[t]he Court committed a prejudicial error of law in instructing the jury in its instruction #21 that 'you may not award any damages for emotional distress experienced by Dorothy Martin or Mary Martin.'" (Mot. at 21.) Again, because the jury never considered damages, any error would be harmless. Also, as discussed earlier, plaintiffs' claims for IIED and NIED were properly dismissed from the case.

I. Consolidation of Claims Under the ADA and Rehabilitation Act

Plaintiffs claim that "[t]he Court committed a prejudicial error of law by consolidating Plaintiffs' claims under the ADA and the Rehab Act, rather than instructing on and submitting each claim to the jury separately." (Mot. at 21.)

The requisite elements of the ADA and the Rehabilitation Act are essentially identical, and the Ninth Circuit has construed them to be co-extensive. Sanchez v. Johnson, 416 F.3d 1051, 1062 (9th Cir. 2005). Moreover, plaintiffs never asserted this objection when given the opportunity before the jury retired to deliberate. All parties, particularly plaintiffs, are assisted

when the jury instructions are as straightforward as possible. Thus, consolidating the claims for purposes of instruction was proper and helped to simplify the jury's consideration of the evidence.

J. Failure to Instruct on § 1983 Claim

Plaintiffs claim that "[t]he Court committed a prejudicial error of law by refusing to instruct the jury on Plaintiffs' claim under 42 U.S.C. § 1983." (Mot. at 21.) As discussed above, plaintiffs did not present sufficient evidence to support a § 1983 claim. Therefore, it was not erroneous to refuse to instruct the jury on this claim.

K. Failure to Instruct on State Law Emotional Distress Claims

Plaintiffs claim that "[t]he Court committed a prejudicial error of law by refusing to instruct the jury on Plaintiffs' state law emotional distress claims." (Mot. at 21-22.) As discussed above, plaintiffs did not present sufficient evidence to support an NIED or IIED claim. Therefore, it was not erroneous to refuse to instruct the jury on these claims.

L. Mary Martin's Standing

Plaintiffs assert that "[t]he Court committed a prejudicial error of law by not permitting Plaintiff Mary Martin to recover any damages under any theory alleged in the Complaint or proven at trial." (Mot. at 22.) As noted previously, Mary Martin did not have standing to recover damages. Moreover, even if the court erred, the jury never reached the issue of damages because

it found that the Department did not violate the ADA or the Rehabilitation Act. (See Verdict Form, Docket # 155.)

M. Removal of Individual Defendants from Consideration

Plaintiffs argue that "[t]he Court committed a prejudicial error of law by removing individual defendants Bruce Thiesen, George Andries, Jr., and Marcella McCormack from consideration by the jury as to their liability." (Mot. at 22.)

The court already disposed of this issue regarding the ADA and Rehabilitation Act claims in its July 21, 2003 Order as follows:

> [p]laintiffs may not bring ADA and Rehabilitation Act claims against CDVA officers in their individual capacities, because both statutes are directed at the actions of public entities only. Miranda B. v. Kitzhaber, ---- F.3d ----, 2003 WL 21078049, *5 n.7 (9th Cir. 2003) (distinguishing ADA suits against state officers in their individual capacities from its holding that plaintiff could obtain injunctive relief under ADA against state officers in their official capacities); Garcia v. S.U.N.Y. Health Sciences Center, 280 F.3d 98 (2d Cir. 2001) ("[N]either Title II of the ADA nor § 504 of the Rehabilitation Act provides for individual capacity suits against state officials."); Alsbrook v. City of Maumell, 184 F.3d 999, 1005 n.8 (8th Cir. 1999) ("['Public entity'] as it is defined within the [ADA], does not include individuals.").

(7/21/2003 Order at 7-8). Accordingly, the court dismissed plaintiffs' ADA and Rehabilitation Act claims against the CDVA officers named in their individual capacities. (Id. at 8.)

Thus, at the time of trial, the individual defendants only remained as to the equal protection and negligence claims. As discussed above, these claims were properly dismissed as to all

defendants.

N. Failure to Give Plaintiffs' Proposed Instructions

Plaintiffs assert that:

> "The Court committed prejudicial errors of law by refusing to give the following instructions, as requested by Plaintiffs: Plaintiffs' proposed instructions 17, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 34, 35, 36, 37 and 39-52. Plaintiffs' proposed instructions (the complete set numbered 1-52), submitted in a timely manner and accurately stating the relevant law, were almost completely disregarded by the Court, who instead substituted its own set of instructions presented to counsel at the conclusion of trial, the very morning the jury was instructed."

(Mot. at 22.)

Despite plaintiffs' assertions, the court did not disregard plaintiffs' proposed instructions, as it used much of the language provided by plaintiffs to create the final instructions presented to the jury. A fair review of plaintiffs' instructions shows that they were not ready for delivery to a jury. It was the court's responsibility to pull together, at considerable effort, a set of instructions that would make sense to a lay jury. Also, the court has no current recollection of the parties protesting that they had inadequate time to review the final instructions or requesting additional time to review them and make objection.

Plaintiffs have not presented any persuasive argument as to why the court's jury instructions, as a whole, were misleading or misstate the law. Instruction 10 cited the exact provisions from the ADA and the Rehabilitation Act which explain the prohibition

against discriminating on the basis of disability. Instruction 11 listed the four elements that the plaintiff must prove to establish ADA and Rehabilitation Act claims. While plaintiffs claim that asking the jury to examine the levels of care was confusing, doing so was necessary to properly evaluate the claim.

Plaintiffs also argue for the first time in their reply brief that the instructions should have: (1) distinguished between levels of care for residents versus applicants; and (2) used the term "dementia" rather than "Alzheimer's." However, these arguments are untimely and should not and cannot be raised now. Fed. R. Civ. P. 51(c).

O. Admitting Dr. Arnott's Testimony

Plaintiffs claim that "[t]he Court committed prejudicial errors of law in improperly admitting the testimony of Dr. Arnott on the matter of Dorothy Martin's condition and care needs." (Mot. at 23.)

Plaintiffs first raised this issue in Motion in Limine #1. They asserted that Dorothy Martin's care needs were irrelevant because this information was not considered by the VHCs at the time they reviewed Dorothy Martin's application. The court denied the motion finding that Dorothy Martin's medical history was at least relevant to her claim for damages. This ruling is correct; her claim for damages would have depended, at least in part, on what she would have paid for services had she been admitted to the VHC versus what she paid on the outside. The parties took very different positions on Dorothy Martin's precise

care needs when she applied and thereafter. Moreover, the testimony was relevant to a central issue in the case: what level of care was appropriate for Dorothy Martin when she applied? The subsequent medical history is relevant to an assessment of her medical condition at an earlier point in time and to the credibility of witnesses testifying to that condition. Accordingly, the decision to admit Dr. Arnott's testimony was proper.

P. Admitting Exhibits 1-18 on Dorothy Martin's Needs

Plaintiffs assert that "[t]he Court committed prejudicial errors of law in improperly admitting Defendants' Exhibits # 1-18, on the matter of Dorothy Martin's condition and care needs." (Mot. at 23.) However, the court's decision was proper for the reasons discussed in Section O.

Q. Refusing to Admit Bob Taylor's Testimony

Plaintiffs claim that "[t]he Court committed prejudicial errors of law in improperly refusing to admit testimony and documentary evidence regarding the statements of Bob Taylor to the effect that the Veterans Home of California did not accept applicants with Alzheimer's disease." (Mot. at 23.)

Bob Taylor was a County Veterans Service Officer assigned to the Yountville VHC in 1998. Mary Martin sought to testify that Taylor told her in 1998 that "the VHC does not and would not admit applicants with Alzheimer's disease." (Def.'s Mot. in Limine #3 at 2.) This statement would be offered for the truth of the matter stated. Defendants moved to exclude any statements

made by Taylor because the statements were hearsay and not admissible as party-opponent admissions. (Id.) More specifically, they asserted that: (1) Taylor was not authorized by defendants to make statements regarding admissions; and (2) the statements were not within the scope of Taylor's agency or employment. (Id. at 3.) Plaintiffs had the burden to prove otherwise. See Brenenman v. Kennecott Corp., 799 F.2d 470, 473 (9th Cir. 1986) ("Rule 801(d)(2)(D) requires the proffering party to lay a foundation to show that an otherwise excludable statement relates to a matter within the scope of the agent's employment.").

In opposition, plaintiffs asserted that Taylor's statements were indeed party-opponent admissions. (Opp'n to Def.'s Mot. in Limine #3 at 2.) They claimed their exhibits showed that the Department "routinely refers applicants and their families to [County Veterans Service Officers ("CSVOs")] (such as Taylor) for assistance with the admissions process." (Id. at 3 (citing Pls.' Exs. 42, 144(f).) Upon hearing these arguments, the court allowed the Department to submit additional evidence to prove Taylor was not authorized to discuss admissions, and the court held an additional hearing on the issue. (10/11/2006 Tr. of Mots. in Limine at 12.)

The Department then filed the declaration of Marcella McCormack, the Administrator of the Yountville Home. (McCormack Decl. at 2.) McCormack stated that Veterans Services Representatives like Bob Taylor are not: (1) responsible for

addressing questions from prospective members regarding admissions polices; (2) part of the Admissions Screening Committee; or (3) briefed as to admissions policy. (Id.) Attached to her declaration was a duty statement stating that Taylor's duties included, among other things: (1) interviewing and counseling Veterans Home members on federal and state veterans benefits; (2) assisting in application completion; and (3) participating in member admissions screening. (Id. Ex. 2.)

Ultimately, the court decided to exclude the evidence. Nevertheless, the court's current recollection is that much of the testimony came in anyway without objection. Even if it did not come in, and the court erred in excluding it, the error would be non-prejudicial. The parties have agreed that the VHCs did not admit new Alzheimer's patients with severe dementia; indeed, the VHCs did not admit any veterans who required placement in the SNF. Plaintiffs may have had the theory that the VHCs did not admit Alzheimer's patients whose symptoms were so mild that they would qualify for the RCFE. But Taylor's cryptic statements were not sufficiently precise to be probative of this issue.

R. Refusing to Admit Plaintiffs' Exhibits 130-135

Plaintiffs assert that "[t]he Court committed prejudicial errors of law in improperly refusing to admit Plaintiffs' Exhibits 130-135 . . . after these exhibits had already been presented during the trial, without objection by Defendants." (Mot. at 23.)

Plaintiffs' exhibits 130-135 include legislative history for

bills AB 324 (1997) and SB 630 (1999). Both of these bills address the needs of the Veterans Homes. Specifically, AB 324 sets out to ensure that veterans' homes meet "the staffing, licensure, and other requirements necessary to provide health care and related services to members of the home who are afflicted with Alzheimer's Disease or other related dementia diseases." (Pls.' Ex. 132.) SB 630 authorizes a financing plan to fund construction or renovation of the veterans' homes. (Pls.' Ex. 135.)

The legislative history for each of the bills states that the veterans' homes do not accept new Alzheimer's patients. Hearing notes for AB 324 from the Assembly Committee on Governmental Organization state that the bill's author "contends that 'If a person is already in a Veterans' Home and develops dementia, he/she can stay. But if you have a dementia related disease and want to get in a Vet home, you cannot.'" (Pls.' Ex. 132.) The notes also say that, "[a]ccording to the DVA, the Homes do not currently admit veterans with Alzheimer's because they do not have the capacity to adequately provide the appropriate care." (Id.) Hearing notes from the Senate Committee on Veterans Affairs state that "[t]he Veterans Department does not at present admit veterans with Alzheimer's disease to the home at Yountville, stating that they do not currently have the capacity to provide adequate care." (Pls.' Ex. 134.) Finally, the bill text of SB 630 states that "[t]he general policy of the department is to not accept veterans into

existing veterans' homes who suffer from Alzheimer's disease or other diseases causing dementia." (Pls.' Ex. 135.)

These exhibits contain inadmissible hearsay. Rule 803(8) provides an exception for public records and reports. However, plaintiffs must prove that the facts stated in the documents were "within the personal knowledge and observation of the recording official or his subordinates." Colvin v. United States, 479 F.2d 998, 1003 (9th Cir. 1973)). "Since the official documents are a substitute for the personal appearance of the official in court, it is generally held that such documents, to be admissible, must concern matters to which the official could testify if he were called to the witness stand." Indep. Iron Works, Inc. v. U.S. Steel Corp., 322 F.2d 656, 672 (9th Cir. 1963). "Reports based upon general investigations and upon information gleaned second hand from random sources must be excluded." Id.

Three of the four statements above state that the information came from another source - either the Department or the author of the bill. The fourth statement does not refer to any source at all. At trial, the Department adamantly denied that it had the policy it supposedly had admitted to. Because plaintiffs did not present any evidence or make any proffer showing that the information was within the recording official's personal knowledge, or the source of that knowledge, the court found that the exhibits were hearsay. On reconsideration, this ruling appears correct.

S. Exclusion of Plaintiffs' Exhibit 156

Plaintiffs assert that "[t]he Court committed prejudicial errors of law in improperly excluding Plaintiffs' Proposed Exhibit 156 and precluding Plaintiffs from eliciting any testimony about the Department's change to its 75% restriction." (Mot. at 24.)

Section 503 of the California Code of Regulations governs admissions to the SNF at Veterans Homes. This section was amended on February 16, 2005 and changed the standard of admission. The old version precluded outside admission unless the occupancy rate fell below 75%. The amended version precludes direct admission if the admission would prevent a current resident of the Veterans Homes from entering the SNF. The Department sought to exclude evidence of the change because it was: (1) irrelevant since the changes were made long after Dorothy Martin passed away; (2) an inadmissible subsequent remedial measure under Rule 407; and (3) prejudicial. (Def.'s Mot. in Limine #2 at 2.)

In opposition, plaintiffs asserted that the evidence should be admitted under the feasibility exception. (Opp'n to Def.'s Mot. in Limine #2 at 2.) However, Rule 407 states that the feasibility exception only applies if feasibility is controverted, which it was not. (Def.'s Mot. in Limine #2 at 2.)

Alternatively, plaintiffs asserted that the impeachment exception should apply. (Opp'n to Def.'s Mot. in Limine #2 at 2.) They contended that the Department has repeatedly claimed that "the 75% restriction was reasonable, necessary, and had a

rational basis." (Id.) However, when the Department changed the law, it stated to the California Office of Administrative Law that the regulation "is considered by the Department to be arbitrary and too severe a restriction, and is not in the best interests of the veterans of California . . . ." (Id.) This, they argued, could impeach the Department's previous claims and demonstrate that the 75% rule was unnecessary and had no rational basis. (Id.)

During the motion in limine hearing, the court ruled that the evidence was: (1) not relevant because of the passage of time; and (2) barred by the policy of Evidence Rule 407. (Tr. at 4.)

Rule 407 provides that "evidence of [] subsequent [remedial] measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction." Fed. R. Evid. 407. This rule arises from the policy that defendants should be encouraged to make improvements without being afraid that those improvements will be used as evidence against them. Albrecht v. Baltimore & Ohio R.R. Co., 80 F.2d 329, 332 (4th Cir. 1987).

The evidence that plaintiffs' hoped to introduce regarding the change in the 75% rule is evidence of a subsequent remedial measure that does not fall under the impeachment exception. The Department may well have believed that the 75% rule was reasonable and appropriate at the time it reviewed Dorothy Martin's application. Evidence that the Department subsequently

changed its view and decided that the rule was arbitrary and too severe a restriction does not impeach the Department's previous position that the restriction was reasonable. The two views can co-exist. Furthermore, to permit evidence of policy changes and the reasons given, under the impeachment exception, would contradict the policy of Rule 407, particularly as applied to a public agency which should not be deterred from changing its policies and explaining those changes to the citizenry. Accordingly, the court does not find that it misapplied Rule 407 or abused discretion.

T. Allowing Defense Counsel "to Improperly Joke with the Judge"

Plaintiffs argue that:

> [t]he Court committed a prejudicial error of law by permitting Defendants' attorney, Mr. McCardle, to improperly joke with the judge during his closing argument. Mr. McCardle was "attempting to curry the favor of the jury by complimenting them, stating that they often had more 'common sense' than the attorneys or the judge, specifically referring and gesturing to the judge." Instead of rebuking counsel for this attempt to ingratiate himself with the jury and portray himself as friendly with the Court, the Court chuckled and allowed Mr. McCardle to continue his presentation uninterrupted. This exchange gave the jury the impression that the Judge and Defendants were on the same team.

(Mot. at 24.)

The court has no recollection of chuckling or smiling but will assume that it did. Surely the court smiled at plaintiffs' counsel at some point during the trial and closing arguments. Indeed, all counsel treated one another and the court with unfailing courtesy throughout the trial in the presence of the

jury. There was no reason to rebuke defense counsel for this offhand reference to the court.

U. Defendants' Motion for Judgment as a Matter of Law

Plaintiffs assert that:

> [d]espite expressing concerns on the record over fairness and the improper timing of the issues raised in Defendants' Motion for Judgment as a Matter of Law, the Court ultimately granted Defendants virtually everything they requested in their motion. When all was said and done, the Court failed to give due weight to the prejudice to Plaintiffs and did not preclude Defendants from bringing any claim they could think of, and several arguments actually suggested by the Court, many for the first time.

(Mot. at 24.) Plaintiffs claim that this "further reflect[s] that the Court appeared to craft, and virtually compel, the conclusion of this case in favor of Defendants." (Id. at 26.) Plaintiffs also claim that defendants waived their rights to assert the arguments made in the motion for JMOL because the arguments were affirmative defenses. (Opp'n to Def.'s Mot. for JMOL at 3 (citing 999 v. C.I.T. Corp., 776 F.2d 866, 871 (9th Cir. 1985); 389 Orange Street Partners v. Arnold, 179 F.3d 656, 663, n.3 (9th Cir. 1999)(citing Grabner v. Willys Motors, Inc., 282 F.2d 644, 646 (9th Cir. 1960)); Brannan v. United Student Aid Funds, Inc., 94 F.3d 1260, 1266 (9th Cir. 1996); Fed. R. Civ. P. 8(c)).

Although the Department sought to dismiss several of plaintiffs' claims in its motion for JMOL, the court only dismissed some of the claims. Those are the claims that are relevant here. The court dismissed: (1) the ADA, Rehabilitation

Act, and equal protection claims raised by Mary Martin because she did not have standing; (2) the compensatory damages claims for violations of the ADA and the Rehabilitation Act because plaintiffs did not provide evidence of intentional discrimination; (3) the equal protection claim raised by Dorothy Martin's estate because plaintiffs failed to show that the Department had no rational basis for its actions; (4) the emotional distress claims raised by Dorothy Martin's estate because they are barred by California's survival statute; and (5) the emotional distress claims raised by Mary Martin because the Department did not owe her a duty. The court's dismissal of these claims was proper. Indeed, the standing issue raised a question of jurisdiction. While it was unfortunate that the defendants did not make appropriate pre-trial motions to dismiss, there was no prejudice to plaintiffs that the motions were made at trial. There was no waiver by the Department because the arguments advanced were not in the nature of affirmative defenses. The court could not permit legally baseless claims to go to the jury. However, Dorothy Martin's disability claim, which is the essence of the case, did go forward and was fully and fairly presented.

V. The Verdict

Finally, plaintiffs assert that "[t]he verdict is against the great weight of the evidence." However, the discussion above regarding the motion for JMOL demonstrates that the verdict was clearly not against the weight of the evidence.

III. Bill of Costs

Defendants seek to recover $7,865.91 in costs. Plaintiffs assert that defendants are barred from recovering their costs under Brown v. Lucky Stores, Inc., 246 F.3d 1182 (9th Cir. 2001). For the reasons stated below, the court denies the Department's claim for costs for the ADA claim and grants its claim for costs for the Rehabilitation Act, civil rights, and emotional distress claims.

A. ADA

Fed. R. Civ. P. 54(d)(1) provides that a prevailing party is entitled to recover its costs absent a contrary direction from the court, the rules, or a federal statute. In Brown, the Ninth Circuit held that costs should be awarded to a prevailing defendant in an ADA action only if the action "was frivolous, unreasonable, or without foundation." 246 F.3d at 1190 (citing Christiansburg Garment Co. v. A. Teichert & Son, Inc., 127 F.3d 1150, 1154 (9th Cir. 1997)). Because this action was not frivolous, it follows that defendants cannot recover costs incurred defending against the ADA claim. The Department concedes this point with regard to Dorothy Martin's ADA claim. However, it asserts that Mary Martin's ADA claim was unreasonable and without foundation because she did not have standing. (Reply at 4.)

A claim is unreasonable and without foundation if "a reasonable inquiry into the applicable facts and law before filing their case they would have discovered the insufficiency of

their . . . claim." Margolis v. Ryan, 140 F.3d 850, 854 (9th Cir. 1998). Under this standard, Mary Martin's ADA claim was not frivolous. In certain circumstances, non-disabled individuals may claim "associational" discrimination, giving them standing to sue under the ADA. Innovative Health Sys. v. City of White Plains, 117 F.3d 37, 46-47 (2d Cir. 1997) (overruled on other grounds). In those cases, the non-disabled individual must show that she "suffered a specific, separate, and direct injury to [herself] caused by defendant's actions." Glass v. Hillsboro Sch. Dist., 142 F.Supp.2d 1286, 1288 (D. Or. 2001). Plaintiffs' reasonable inquiry into the facts and law could have led them to conclude that Mary Martin suffered such an injury because she had to pay for alternate care for her mother. Although her claim is ultimately not supportable, "very few published opinions address this issue," Glass, 142 F.Supp.2d at 1287 n.2. Therefore, Mary Martin's ADA claim was not frivolous. The court notes that defendants must not have deemed the claim frivolous during the period for pre-trial motions since no motion to dismiss Mary Martin's ADA claim on this ground was made. Accordingly, the court denies the Department's request for costs on plaintiffs' ADA claim.

B. Rehabilitation Act

Plaintiffs claim that the Christiansburg test should also apply to an award of costs under the Rehabilitation Act since the Act also treats attorney's fees and costs as parallel. (Opp'n to Bill of Costs at 2.) However, plaintiffs point to no precedent,

nor could the court find any, to support this contention. Indeed, the language of the Rehabilitation Act seems to support the opposite conclusion. The Rehabilitation Act attorney's fee provision allows the prevailing party "a reasonable attorney's fee as part of the costs," 29 U.S.C. § 794a(b), whereas the ADA allows the prevailing party "a reasonable attorney's fee, including litigation expenses, and costs." Thus, under the Rehabilitation Act, attorney's fees are considered "part of the costs" rather than a separate recovery.

In that regard, the Rehabilitation Act is more similar to the attorney's fee provision for Title VII, which also allows the prevailing party "a reasonable attorney's fee . . . as part of the costs." 42 U.S.C. § 2000e-5(k). In Title VII cases, the Christiansburg test does not apply to an award of costs, even though it applies to an award of attorney's fees. Nat'l Org. for Women v. Bank of Cal., 680 F.2d 1291, 1294 (9th Cir. 1982). The Ninth Circuit reasoned that "[t]here is no express statutory provision for applying Christiansburg to cost awards, and we see no reason to impose rigid limitations on the district court's discretion." Id. This same reasoning would seem to apply to an award of costs under Title II, given the similarity of language between the two statutes. See Halasz v. Univ. of New England, 821 F.Supp. 40, 42 (D. Me. 1993)("[i]t is clear from the wording of section 794a(b), which permits attorney's fees as a discretionary element of costs, that Congress intended the costs of litigation to be awarded generally as a matter of course in

Rehabilitation Act cases as they are under . . . Rule 54.").

In light of this case law, the court finds that Rule 54 rather than the Christiansburg test applies to an award of costs under the Rehabilitation Act. Accordingly, the Department's request for costs under this claim is granted.

C. Section 1983 and Emotional Distress Claims

Plaintiffs present no argument why Rule 54 should not also apply to its civil rights and emotional distress claims. Therefore, the court awards costs to the Department for these claims as well.

D. Apportionment of Costs

The award of costs "rests within the sound discretion of the trial judge." EEOC v. Pierce Packing Co., 669 F.2d 605, 609 (9th Cir. 1982). This case involved four main claims under the ADA, the Rehabilitation Act, Section 1983 and California tort law. However, the ADA claim was the central claim. Because the Department cannot recover costs for the ADA claim, and because it was the focus of the litigation, the court awards 50% of its total request, or $3,932.95.

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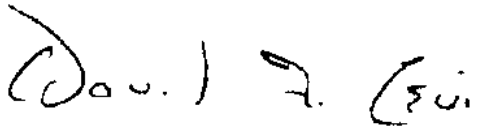
IV.

For the reasons stated above, plaintiffs' motions for judgment as a matter of law and for new trial are DENIED. Defendants are awarded costs in the amount of $3,932.95.

IT IS SO ORDERED.

Dated: 8/31/2006



DAVID F. LEVI
United States District Judge